as tending to show delivery, since the authorship of the instrument is also in issue. It is submitted, however, that the case was correctly decided in view of the tendency of the holdings of the Court of Appeals. The objection was taken, not to the witness's proving the genuineness of the signature, but to the method by which she attempted to establish her knowledge of the decedent's handwriting. She was testifying to impressions of conduct derived from her observation of acts of the decedent, which he, if alive, could have denied. The case is clearly within the second test laid down at the beginning of this discussion, and is supported by the *Eysamen* case. The case of *Wing* v. *Bliss* (1889) 8 N. Y. Supp. 500, affd. on opinion below, (1893) 138 N. Y. 643, which is apparently contra, rests solely on the authority of *Simmons* v. *Havens* (1886) 101 N. Y. 427, which merely decided that the witness might testify as to the genuineness of the signature, no objection being made to the laying of the foundation. On the other hand it has been held that, where the existence of a partnership is in issue, an interested witness may not testify that he saw the decedent write the partnership name in a firm book. *Adams* v. *Morrison* (1889) 113 N. Y. 152. It may, however, be argued that only evidence concerning personal transactions relevant to the issue should be excluded, and not evidence introduced merely for the purpose of laying a foundation. This distinction is arbitrary, and finds no support in the language of the section. The case, while extreme, is to be supported.

PROPERTY IN A POWER.—How far an absolute and beneficial power confers upon the donee incidents of ownership in the property subject to appointment, is a question which has been unsatisfactorily answered. A judgment can only be satisfied, whether by legal or equitable execution, from the property of the debtor. At law, a power of appointment did not give the donee title to the property subject to the power, and, therefore, such property could not be reached by legal execution. Courts of equity, however, for a time considered a right of enjoyment coupled with an absolute power of beneficial appointment as equivalent to the absolute property. The donee of such a power was "owner in Equity." *Ashfield* v. *Ashfield* (1693) 2 Vern. 287. A century later, an estate subject to the appointment of an equitable life tenant was said to be "as absolutely hers as any other part of her property," and passed under the residuary clause of her will. *Standen* v. *Standen* (1795) 2 Ves. Jr. 589; and see *Bainton* v. *Ward* (1741) 2 Atk. 172. But this attitude was finally repudiated, and some fine lines were drawn between powers and property. *Bradley* v. *Westcott* (1807) 13 Ves. Sr. 445; *Barford* v. *Street* (1809) 16 Ves. Jr. 135. The distinction, however, was so firmly established that in *Ex parte Gilchrist* (1886) 17 Q. B. D. 512, Fry, L. J., was moved to say, "No two ideas can be more distinct the one from the other than those of 'property' and 'power.' A 'power' is an individual and personal capacity of the donee of the power to do something. That it may result in property becoming vested in him is immaterial, the general nature of the power does not make it property. * * * I am almost ashamed to deal with such an elementary proposition."

Yet, in certain cases, equity will assist a creditor. If the donee appoints by deed or will to a volunteer, the property, real and personal, becomes assets

for the payment of his debts. *Townshend* v. *Windham* (1750) 2 Ves. Sr. 1. Equity further aids the defective execution of a power in favor of creditors, purchasers for value, and meritorious claimants. *Tollet* v. *Tollet* (1728) 2 P. W. 490. Or if a mere intention is shown by the donee to execute the power in discharge of legal or natural obligations, the court will operate on the conscience of the heir,—or of persons entitled in default,—to make him perfect his intention. *Chapman* v. *Gibson* (1791) 3 Bro. C. C. 229. But equity will not aid the non-execution of a power not in trust. That could not be done without "striking at once out of the books the very notion and character of a power." *Holmes* v. *Coghill* (1806) 12 Ves. Jr. 206.

This equitable relief grew out of cases which, though rightly decided on other grounds, were based upon equity's early conception of an absolute power; it was retained and extended after that conception had been abandoned. The results reached, as might be expected, are both inconsistent and illogical. *Thompson* v. *Towne* (1694) 2 Vern. 319 is said to have originated the doctrine of appointed powers as equitable assets. *Clapp* v. *Ingraham* (1879) 126 Mass. 202; but see *Ashfield* v. *Ashfield* (1693) 2 Vern. 287. That case, in which the donee of the power was himself the settlor of the estate, is clearly distinguishable from those cases subsequently brought within the same rule, but in which the donee appoints property which he has never owned. The estate subject to appointment must either be the property of the donee, or it must be vested in the donor or remainderman. If it is the property of the donee it should be reached by equitable execution though unappointed. In the other alternative, either the donor or the remainderman has a right that his interest shall not be divested except by appointment in accordance with the terms of the power, and equity's aid of a defective appointment infringes that right not less than would a total execution of the power by equity itself. In the case of a good appointment, but made to volunteers, the latter should take unless the court can say that the donor has sought to impose an unlawful restraint on alienation, in which case the appointment may justly be treated as a voluntary conveyance of the donee's property in fraud of creditors. Thus if the court of equity were consistent it would execute a power quite as readily as it aids a defective execution, while if it were logical it would respect absolutely the terms granted by the donor in giving the power, or else declare that the donor had failed in his attempt to create property rights without their corresponding obligations.

The doctrine of appointed powers as equitable assets serves, therefore, to show that there can be no middle ground between powers and property. Its persistence is undoubtedly due to the feeling that some powers amount, in substance, to property, but the origin and continued use of a power as a mere agency of the donor has prevented the courts from judicially recognizing them as such. Legislation, however, has done so in certain cases. Thus in England, the property of a bankrupt comprises the capacity to exercise all beneficial powers. Bankruptcy Act of 1883 § 44. So a judgment is a charge on lands subject to the debtor's beneficial appointment. 1 & 2 Vict. c. 110, s. 13. With these exceptions it is still true that a power will not be appointed involuntarily. Creditors, therefore, have no recourse to property subject to appointment if the donee dies insolvent, not being a bankrupt or a judgment debtor. In New York powers as they existed on

December 31, 1829, were abolished. To the minds of the New York Revisors it was "an affront to common sense to say that a man has no property in that which he may sell when he pleases and dispose of the proceeds at his pleasure," and from that view-point they wrote a new law of powers. Under it, a power by which a donee may dispose in his lifetime of the entire fee for his own benefit, if no remainder is limited, gives the donee the absolute property. Where a remainder is limited the donee has a fee as regards creditors, purchasers and incumbrancers; so also where he is given a beneficial power to appoint by will, coupled with an estate for life or for years. Real Prop. Law, §§ 129-133; *Deegan* v. *Wade* (1895) 144 N. Y. 573. But it has been held that the exercise of a beneficial power by the will of an *equitable* life tenant does not subject the *corpus* of the trust estate to the claims of creditors. *Cutting* v. *Cutting* (1881) 86 N. Y. 522. Thus the doctrine of appointed powers as equitable assets, which was formerly applied in New York, *Tallmadge* v. *Sill* (N. Y. 1855), 21 Barb. 34, is no longer law. In a recent case, it was held, however, that if such a life tenant has a power of appointing the entire equitable fee by deed, though the legal title cannot be passed during the term of the trust, an interest has been conveyed which creditors may reach. *Farmers' Loan & Trust Co.* v. *Kip* (N. Y. 1908) 85 N. E. 59 (*semble*). Legislation on powers, such as that of New York, has destroyed to a large extent the integrity of a very highly developed and intricate branch of the common law, but in practice it is probable that greater justice is obtained. A power *as such* has not been converted into property. But while at law an absolute power gave property only if appointed to the donee himself, and in equity an *exercise* of the power to volunteers was at once a receipt of property by the donee and his fraudulent conveyance of it, under the New York Statutes the power *unexercised* in some cases invests the property subject to appointment with many incidents of ownership in the donee, in other cases vests in him the absolute property.

ASPECTS OF THE RIGHT TO RECOVER FOR BENEFITS CONFERRED UNDER MISTAKE OF FACT.—The limits of the right to recover *quasi ex contractu* for benefits conferred are, from the nature of the remedy, uncertain. Of course, enrichment at the plaintiff's expense is alone not enough to bind the defendant *ex æquo et bono*: as when the benefit was intended as a gratuity; or resulted as an inevitable incident to benefits secured to the plaintiff. *U. S.* v. *Pac. R. R.* (1887) 120 U. S. 227. A subsequent adoption of a benefit originally unrequested, though ineffective to ground an action in pure contract, (since the "consideration" would be "past") *Thomson* v. *Thomson* (N. Y. 1902) 76 App. Div. 178, may, however, render the adoptor liable *quasi ex contractu*. But often the benefit is incapable of rejection, e. g., repairs by one tenant in common, *Leigh* v. *Dickinson* (1884) 15 Q. B. D. 60; and, it seems, acceptance must consist in some positive act, such as pleading the stranger's payment in a suit by the creditor. Cf. *Goodnow* v. *Stryker* (1883) 61 Ia. 261. Affirmative steps toward avoiding an unsolicited benefit do not seem to be required. The fundamental notion is that no one can thrust himself on another as a creditor, either by improvement of his property or discharge of his obligation. The assignability of debt claims